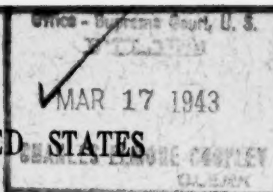


15
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942



No. 833

HAZEL E. CRANSTON,

Petitioner,

vs.

RANSFORD C. THOMPSON AND FRANK B. THOMP-
SON AND MARTHA A. BROWN.

No. 834

HAZEL E. CRANSTON,

Petitioner,

vs.

RANSFORD C. THOMPSON, FRANK B. THOMPSON,
AND RANSFORD C. THOMPSON, AS EXECUTOR OF THE
LAST WILL AND TESTAMENT OF SARAH A. THOMPSON,
DECEASED.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

CLARENCE G. PICKARD,
MICHAEL D. LOMBARDO,
Counsel for Petitioner.



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LAST WILL AND TESTAMENT OF SARAH A. THOMPSON,
DECEASED.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

Petition for Writs of Certiorari.

The petitioner above named respectfully prays that writs
of certiorari be issued from the Supreme Court of the

United States directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 48, October Term, 1942, Martha A. Brown, plaintiff, against Hazel E. Cranston, defendant and third party plaintiff (appellant) against Ransford C. Thompson and Frank B. Thompson, third party defendant (appellees), and in the case numbered and entitled No. 49, October Term, 1942, Ransford C. Thompson, as Executor of the last Will and Testament of Sarah A. Thompson, deceased, plaintiff, against Hazel E. Cranston, defendant and third party plaintiff (appellant) against Ransford C. Thompson and Frank B. Thompson, third party defendants (appellees), and that the decrees of the Circuit Court of Appeals and the judgments of the District Court as decreed may be reversed, and that the petitioner may have such other and further relief as may be just and proper.

Opinions Below.

The opinion of the District Court, is reported in 2 Federal Rules Decisions 270 (R. 39). The opinion of the Circuit Court of Appeals is reported in 132 F (2d) 631 (R. 54).

Jurisdiction.

The order and judgment of the Circuit Court of Appeals was entered on December 23rd, 1942. The jurisdiction of the Supreme Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13th, 1925 (U. S. C. A. Title 28, Section 347).

Statutes and Rules Involved.

Construction of one of the Federal Rules of Civil Procedure promulgated by this Court at its October 1937, term

and two acts of the New York State Legislature are directly involved. All are printed in full in Appendix A of this brief. The Federal Rule of Civil Procedure is Rule 14-a. The acts of the New York State Legislature are Section 193, Sub-division 2 of the Civil Practice Act (Laws of 1920, Chapter 925, as amended by Laws of 1922; Chapter 624, and Laws of 1923, Chapter 250, and Section 211-a of the Civil Practice Act as amended by Laws of 1928, Chapter 714).

Summary Statement of Matter Involved.

These are two companion actions arising out of the same automobile accident. In each case, the plaintiff sued Hazel E. Cranston alleging negligence (R. 3; 25). The plaintiff, Martha A. Brown and plaintiff's testate, Sarah A. Thompson, were passengers in an automobile alleged to be driven by Frank B. Thompson and owned by Ransford C. Thompson. This automobile collided at a highway intersection in Chautauqua County, New York, with an automobile operated by Hazel E. Cranston. The accident occurred August 20th, 1940. Plaintiff, Martha A. Brown, received injuries for which she sued Hazel E. Cranston, and Sarah A. Thompson received injuries which are alleged to have resulted in her death September 19th, 1940 (R. 4).

After the institution of the actions, the defendant, Hazel E. Cranston, answered (R. 5; 26), and thereafter moved under Rule 14-a of the Federal Rules of Civil Procedure to bring in Ransford C. Thompson and Frank B. Thompson as third party defendants (R. 7; 28). Her application was granted in each case (R. 10; 31). No one opposed the application (R. 11, 31), and in fact, the plaintiffs consented thereto. The defendant, Cranston, thereupon filed her third party summons and complaint (R. 12; 33).

The third party defendants appeared and moved to vacate the order bringing them in (R. 15), and this motion

was granted (R. 22; 36), and appeals from that order were taken to the Circuit Court of Appeals for the Second Circuit (R. 24; 37), where the determination was affirmed (R. 59, 60).

It is undisputed that the plaintiffs are citizens of the State of Pennsylvania, and the defendant, Hazel E. Cranston, a citizen of the State of New York (R. 19-20). The accident out of which the causes of action arise occurred within the State of New York (R. 20). The third party defendants are both residents of the State of Pennsylvania (R. 18-19).

The Importance of the Questions Raised.

The question that is presented by this application is whether a defendant sued in a United States District Court of the State of New York may bring in, pursuant to Rule 14-a of the Federal Rules of Practice in the light of Section 193, Sub-division 2 and Section 211-a of the Civil Practice Act of the State of New York, third party defendants whom it is alleged occasioned or contributed to the plaintiff's injuries.

It is submitted that the application presents an important question of Federal Law which has not been but should be settled by this court, and the review is sought by virtue of Rule 38, Subdivision 5-b of the Rules of the Supreme Court of the United States.

As will appear from the memorandum which follows, there has been no uniformity of decisions in the district courts, and the question should be determined by this court as to the applicability of Rule 14-a of the rules of this court to cases arising in states where there are limitations upon the right to bring in joint tort feasons at the behest of a defendant.

Questions Presented.

A.

Whether the defendant and third party plaintiff may bring in as a third party defendant in a district court of the United States within the State of New York a party whose negligence is alleged to have caused or contributed to the damage of the plaintiff.

B.

Whether the defendant and third party plaintiff is entitled to bring in the third party defendant and have their interests determined under the third party complaint without an amendment by the plaintiff.

C.

Whether diversity of citizenship is a pre-requisite with respect to bringing in third party defendants.

Reasons for Granting the Writs.

A.

Numerous district courts of the United States have held that Rule 14 by its very *raison d'être* precludes a vested right of election of defendants in the original plaintiff, and permits persons alleged to be joint tortfeasors to be brought into the case whether or not the original plaintiff elected to put them into the case. The rule has been upheld in Louisiana (*Gray v. Hartford Accident & Indemnity Company*, 31 Fed. Supp. 299, 305; 32 Fed. Supp. 335, 336); in Pennsylvania (*Sklar v. Hayes*, 1 F. R. D. 415, 416; 1 F. R. D. 594, 596; *Bossard v. McGwinn*, 27 Fed. Supp. 412, 413; *Kravas v. Great Atlantic & Pacific Tea Company*, 28 Fed. Supp. 66, 67); and in West Virginia (*Crum v. Appalachian*

Electric Power Company, 27 Fed. Supp. 138, 139). One district court in New York, prior to the decision in the present case, held that a third party defendant could be joined under similar circumstances in New York. (*Lensch v. Boushell Carrier Co.*, 1 F. R. D. 200.)

It is claimed that by virtue of the provisions of Section 193, Sub-division 2 of the New York Civil Practice Act and Section 211-a of the New York Civil Practice Act, as construed by the Court of Appeals of New York that a joint tortfeasor may not be added as a defendant at the instance of a defendant. The Court of Appeals of New York has declared:

“A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The Legislature has not yet given this same choice to the defendants to bring in other parties, whom they think should be liable either in place of or jointly with those whom the plaintiff has selected. If section 193 is to be extended, it must be by act of the Legislature and not by the fiat of the courts.”

Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 308-309.

The learned District Judge declares in his opinion:

“The rule is that, where the law of the State in which suit is brought provides for a contribution by the joint tortfeasors, a joint tortfeasor may be brought in. Such is not the case here.” (Fol. 121.)

The Circuit Court of Appeals in the next to the last paragraph of its opinion below said: “We do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Court” (R. 59).

It is submitted that the decisions below are erroneous. Had the plaintiff sued in the New York Courts and elected to sue both alleged tortfeasors and had recovered judgment

against both, the defendant paying the judgment would have a right to contribution against the other by virtue of Section 211-a of the Civil Practice Act.

Neenan v. Woodside Astoria Transportation Co., 261 N. Y. 159, 164-165;

Martin v. Miller, 242 A. D. 38-39; Affirmed, 266 N. Y. 668.

Certain anomalies are presented if the decisions of the courts below are correct. The State of Pennsylvania permits contribution between joint tort feorsors. In the State of New Jersey, no right of contribution between joint tort feorsors can be enforced. An action was instituted in the courts of Pennsylvania and removed to the Federal Court upon the ground of diversity of citizenship. The accident occurred in New Jersey. The Federal District Court held that it was within the province of the defendant to bring in the joint tort feorsor.

Sklar v. Hayes, 1 F. R. D. 415, 416; 1 F. R. D. 594, 596.

Under the holding of the courts below, had this action been brought in the United States Courts for Pennsylvania, the third parties could have been brought in and required to defend. Yet, because the statutes of New York do not provide a method for bringing in a joint tort feorsor at the instance of a defendant, although if brought in by the plaintiff the right of contribution is thereupon held to exist between them, it is asserted that the same recourse may not be had under Rule 14-a.

In other words, had this action been brought by the plaintiff in Pennsylvania, or had the accident occurred in Pennsylvania and the action been brought there, we could have had the relief which we seek. Because, however, it is maintained in a co-ordinate court in the State of New York, the remedy is denied to us.

The Federal Rules govern procedure in the Federal Courts, and even though the state rule may be different, there is no reason why that should be held a limitation upon the rules of Federal Practice.

For example, take the rule of contributory negligence. In the State of New York, except in death cases, where the rule has been changed by statute, it is well established that a plaintiff must establish his freedom from contributory negligence.

Lyman v. Village of Potsdam, 228 N. Y. 398, 406.

Although this is a rule of substantive law in New York, the Federal Rule is to the contrary, and where an accident occurred in New York State and the action was tried in the District Court of the State of New York, the United States Supreme Court has declared that the burden rests, nevertheless, upon the defendant contrary to the state rule.

Miller v. Union P. R. Co., 290 U. S. 227, 232, 78 L. Ed. 285, 289.

See also:

Central Vermont Railway Co. v. White, 238 U. S. 507, 512, 59 L. Ed. 1433, 1437;

Pokora v. Wabash R. Co., 292 U. S. 98, 100, 78 L. Ed. 1149, 1152.

The learned court below has declared that in the light of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, and *Klaxon Co. v. Stentor Electric Co.*, 313 U. S. 487, that it does not feel justified in giving to the defendant a recovery which could not be obtained through any remedy available in the New York State courts (R. 58-59).

It is impossible, within the reasonable, necessarily limited scope of an argument in support of a petition for certiorari, to discuss in detail all of the limitations and impli-

cations pertaining to those two decisions of this court. We submit, however, that the question presented in the cases at bar should be examined by this court, and the two decisions last cited should be re-examined with respect to their applicability to a situation of this character.

Under Section 211-a of the New York Civil Practice Act, contribution among joint tort feorsors is permitted. The courts have merely held that the Legislature has not furnished the procedure for permitting a defendant to join in an action a joint tort feosor.

This matter presents a problem of great importance in the administrator of Federal Law in the light of the provisions of Rule 14-a of the Federal Rules of Civil Procedure, and it is submitted that the practice in the Federal Courts should not accord a choice of remedy to a litigant by the accident of whether the plaintiff shall have elected to sue, for instance, in the District Court of the United States for Pennsylvania rather than in the District Court of the United States for New York.

This is not a question similar to that considered in *Erie R. R. Co. v. Tompkins*, in which the Court applied the substantive law of a state to this question of legal liability, and resolved a conflict of law which is there discussed. Assuming that the third party defendants were negligent and the plaintiffs free from negligence, their liability exists if enforcement is sought under the law of both New York and Pennsylvania. The question here is whether that liability may be determined within the forum in which the plaintiff has elected to litigate against this particular defendant. The plaintiff is still free under the law of both New York and Pennsylvania to sue the third party defendants and procure an adjudication of their liability. The question is whether a rule of Federal Procedure adopted to secure uniformity of procedure in the Federal Courts shall have uniformity of application.

This is the first case of which we have knowledge that has gone to a Circuit Court of Appeals upon this subject. There has been great diversity of opinion among the District Courts, and the matter has received the consideration of text writers. We submit that the matter should be settled by this court, and that its determination should be made upon what we submit is an important question of Federal Practice.

B.

Mrs. Cranston is entitled to have the liability of the third party determined without requiring an amendment by the plaintiff. Our adversary has argued that in order to hold a third party in, the plaintiff's complaints must be amended, and that this would destroy the diversity of citizenship. By reason of what we shall point out in subdivision c, the question of diversity of citizenship is immaterial as to a third party defendant. It should be observed that the plaintiff has at no time indicated an unwillingness to amend nor has he been given an opportunity to do so if that is prerequisite. The decisions in both the United States Circuit Court of Appeals and the District Court have turned upon the question of the power to bring them in, and there has been no distinction drawn as to whether or not the plaintiff elects to amend. If that is prerequisite, the plaintiff should be given that right. However, in *Sklar v. Hayes*, 1 F. R. D. 415, 416, it was held that there is no force in this argument. It is held that the defendant may plead for the plaintiff.

Gray v. Hartford Accident & Indemnity Company, 31 Fed. Supp. 229, 305.

It should be observed, however, that the plaintiff did not oppose bringing in a third party defendant (R. 11, 31). At no time has the plaintiff declined the opportunity to plead against the third party defendants, and the judgment

below has not turned upon that question. The courts have held that there is no authority to bring the third party in under any conditions, and have not made it conditional upon the third party amending if the third party elects to do so. Rule 14-a provides:

“The plaintiff may amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant.”

We submit that there is no requirement that the plaintiff amend, but as he has not declined to do so, and if such a condition is necessary, the judgment should have been made conditional upon his refusal so to do.

C.

Diversity of citizenship is not prerequisite with respect to bringing in third party defendants. If such a construction is put upon Rule 14, it will result that in most cases in the Federal jurisdiction the rule will be absolutely useless, and there are numerous decisions which state that such requirement is not prerequisite.

Wichita Railroad & L. Co. v. Public Utilities Commission, 260 U. S. 48, 53-54;

Williams v. Keyes, 125 Fed. 2nd 208, 209;

Morrell v. United Air Lines Transport Corporation, 29 Fed. Supp. 757, 758;

Gray v. Hartford Accident & Indemnity Company, 31 Fed. Supp. 299, 305;

Bossard v. McGwinn, 27 Fed. Supp. 412-413;

Kravas v. Great Atlantic & Pacific Tea Company, 28 Fed. Supp. 66, 67;

Crum v. Appalachian Electric Power Company, 27 Fed. Supp. 138, 139.

Conclusion.

Rule 1 of the Federal Rules of Procedure provides that the rule "shall be construed to secure the just, speedy, and inexpensive determination of every action." It is respectfully submitted that the rules should be as applicable to a case brought in a Federal District Court sitting in the State of New York when the accident occurred in New York or Pennsylvania, to the same effect as could be done if the accident had been brought in a United States District Court for Pennsylvania, regardless of whether the accident occurred in New York or Pennsylvania.

For the reasons herein set forth, it is respectfully submitted that the petition for writ of certiorari in the instant cases should be granted.

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APPENDIX.

Rule 14(a) of the Federal Rules of Civil Procedure:

“Rule 14. Third-party Practice.

(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counter-claims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.”

Section 193 of the New York Civil Practice Act (Laws of 1920, Chapter 925, as amended by Laws of 1922, Chapter 624, and by Laws of 1923, Chapter 250:

“Sec. 193. Determination of Rights of Parties Before the Court. * * *

2. Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against

such party in the action, the court, on application of such party, may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such a judgment as may be proper."

Section 211(a) of the New York Civil Practice Act, Laws of 1928, Chapter 714:

"Sec. 211-a. Action By One Joint Tort-Ffeasor Against Another. Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."



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United States Court, U. S.
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CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 833.

HAZEL E. CRANSTON, *Petitioner,*

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HAZEL E. CRANSTON, *Petitioner,*

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RANSFORD C. THOMPSON, FRANK B. THOMPSON,
and RANSFORD C. THOMPSON, as Executor
of the Last Will and Testament of Sarah
A. Thompson, Deceased.

BRIEF OF RESPONDENTS, RANSFORD C. THOMPSON AND
FRANK B. THOMPSON, IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

HAROLD J. ADAMS,
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Ransford C. Thompson and
Frank B. Thompson.*



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Supreme Court of the United States

October Term, 1942.

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BRIEF OF RESPONDENTS, RANSFORD C. THOMPSON AND FRANK B. THOMPSON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Summary Statement of Matter Involved.

These cases, brought in the United States District Court for the Western District of New York, are negligence ac-

tions resulting from the collision of two automobiles (R. 3; 25). The defendant, claiming the right to do so as third party plaintiff, under Rule 14-a of the Federal Rules of Civil Procedure, secured orders bringing in as third party defendants the respondents, Ransford C. Thompson and Frank B. Thompson, the owner and operator of the other car involved (R. 10; 31). Pursuant to these orders third party complaints were served (R. 13; 34).

On motion of the third party defendants, respondents Ransford C. Thompson and Frank B. Thompson herein, the District Court vacated the orders bringing in the third party defendants and dismissed the third party complaints (R. 22; 36). This relief was accorded to the third party defendants, Ransford C. Thompson and Frank B. Thompson, because under the substantive law of New York State there is no right of contribution among joint tort feorsors except where the plaintiff brings his action against two or more defendants and a judgment is obtained against such defendants as joint tort feorsors.

The District Court further held that under the Law of New York there could be no recovery against the third party defendants unless the plaintiffs amended their complaints and further that the plaintiffs could not amend their complaints to allege causes of action against the third party defendants because the plaintiffs and both the third party defendants are citizens of the State of Pennsylvania (R. 3, 18, 19, 25).

The determination of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the District Court, is reported in 2 Federal Rules Decisions 270 (R. 39). The opinion of the Circuit Court of Appeals is reported in 132 F (2d) 631 (R. 54).

Jurisdiction.

It is respectfully submitted by the respondents, Ransford C. Thompson and Frank B. Thompson, that no special or important reasons exist for the granting of a writ of certiorari.

The Circuit Court of Appeals has not rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter.

General Talking Pictures Corporation v. Western Electric Co., 304 U. S. 175

The Circuit Court of Appeals has not decided a question of local law in a way in conflict with applicable local decisions. The decision of that Court is in conformity with the substantive law of the State of New York that there is no contribution among joint tort feorsors.

The petition simply presents a question of state law.

Richlin v. New York Life Ins. Co. 304 U. S. 202, 206:

"As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari."

* * *

"We decline to decide the issue of state law."

Even if this Court were to grant a writ of certiorari because of lack of uniformity in District Court decisions,

there is, as we shall hereinafter point out, no such lack of uniformity.

Points of Law Discussed.

It is the position of the respondents that they cannot be properly joined as third party defendants in these actions for the following reasons:

A. If the plaintiffs do not amend their complaints, there can be no recovery against the third party defendants, since the right of contribution among joint tortfeasors does not exist under the Laws of New York State.

B. The plaintiffs cannot amend to allege causes of action against the third party defendants because the plaintiffs and both the third party defendants are citizens of the same state.

ARGUMENT.

A.

In bringing in the third party defendants, the defendant and third party plaintiff relied on Rule 14-a of the Federal Rules of Civil Procedure. This is, of course, a rule of procedure only and does not change the substantive law of the State of New York which does not permit contribution among joint tortfeasors except where a judgment has been obtained against two or more joint tortfeasors.

Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305.

Section 211-a of the Civil Practice Act, (Page 14 of Petition).

It is only in the case of primary and secondary liability that the defendants may bring in an additional defendant.

Section 193 of the Civil Practice Act, (Page 13 of Petition).

It is clear that the question of contribution among joint tort feasons is not a matter of procedure but of substantive law.

Bohn v. American Export Lines, Inc., 42 Fed. Supp. 228, 229 (D. C. S. D. of New York, 1941):

"Since *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the state law is determinative of the right to indemnity or contribution. *Kravas v. Great Atlantic & Pacific Tea Co.*, D. C., 28 F. Supp. 66. As to matters of pleading the Federal Rules control."

Unless amended complaints are served by the plaintiffs against the third party defendants, it is clear that no recovery could be had against the third party defendants and the District Court properly vacated the order directing the inclusion of the third party defendants and dismissed the third party complaints.

Malkin v. Arundel Corporation (D. C. of Md., 1941), 36 Fed. Supp. 948.

In that case the motion to rescind the order for the third party complaint was granted conditionally, the order providing that unless within ten days after service of notice on plaintiff or his counsel, the plaintiff amends his complaint to assert a joint claim against the third party defendant and the original defendants. In the case at bar, the motion was absolutely and not conditionally granted by the District Court because of the fact that the plaintiffs

cannot so amend their complaints as established by the authorities set forth in Point II of this brief.

Holtzoff, *New Federal Procedure*, Sec. 5, Pg. 48:

"If the third-party defendant is not liable over to the original defendant but is only directly liable to the original plaintiff, it becomes necessary for the original plaintiff to amend his complaint after the third party is brought in so as to assert his claim against such third party."

Sklar v. Hayes, 1 *Federal Rules Decisions* (D. C., E. D. Pennsylvania, 1941) 594.

Satink v. Holland, 31 *Fed. Supp.* 229 (D. C., D. New Jersey, 1940).

Crim v. Lumbermen's Mut. Casualty Co., 26 *Fed. Supp.* 715, (D. C. of Dist. of Columbia, 1939).

Whitmire v. Partin, 2 *Federal Rules Decisions*, 83, (D. C., E. D. Tenn., 1941).

General Taxicab Assn. v. O'Shea (U. S. Ct. of Appeals, Dist. of Columbia, 1940) 109 *Fed. Rep.* (2d) 671.

Rule 14 is an adoption of Admiralty Rule No. 56. Under Admiralty Rule 56, it has always been held that claimant could not proceed against an impleaded party unless he amended his petition.

Jensen v. Bank Line, 26 *Fed. Rep.* (2d) 173 *Circuit Court of Appeals*, 9th Circuit—1928).

Burns Bros. v. City of New York, 22 *Fed. Supp.* 55 (D. C., S. D. New York, 1938).

The Federal Rules of Civil Procedure relate only to procedure and a right of contribution cannot be created by these rules. As to joint tortfeasors, Rule 14 is effective only in those states where there is contribution among joint tortfeasors.

Washington Institute on Federal Rules (American Bar Association) Pg. 62.

New York Symposium on Federal Rules (American Bar Association) Pg. 296.

B.

Those cases in which a defendant as third party plaintiff has been allowed to bring in a third party defendant, may be classified as follows: (1) Decisions in States in which contribution among joint tort feasons is allowed. (2) Claims of indemnity over against the third party defendant by the third party plaintiff. Such claims, of course, are recognized in New York State where the defendant seeks to bring in one who is primarily liable.

These cases do not present the situation here involved where under the Law of New York State there is no contribution among joint tort feasons, and where the court does not have jurisdiction of a claim by the plaintiffs against the third party defendants because the necessary diversity of citizenship is lacking.

Federal Rules of Civil Procedure, Rule 82:

"These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

Hoskie v. Prudential Ins. Co. of America, 39 Fed. Supp. 305, (D. C., E. D. of New York, 1941).

Johnson v. G. J. Sherrard Co. & New England Tel. & Tel. Co., 2 F. R. D. 164 (1941).

Herrington v. Jones, 2 F. R. D. 108 (D. C., E. D. of Louisiana, 1941).

Osthaus v. Button, 70 Fed. Rep. (2d) 392 (Circuit Court of Appeals 3d Circuit, 1934).

New York Symposium on Federal Rules, Pg. 296 (*Supra*).

It is clear from the authorities that while a defendant may bring in another party who is or may be liable to the plaintiff or to the defendant, that Rule 14 is a rule of procedure and does not change the substantive law, and cannot be invoked so as to permit a defendant to bring in a third party defendant and thereby secure a joint judgment against the defendant and the third party defendant. This cannot be done because of the simple fact that there is no contribution among joint tort feasons in New York except after the entry of a judgment. It is well established by the authorities that a judgment cannot be secured in favor of the plaintiff against a third party defendant unless the plaintiff's complaint is amended. In the case at bar, the plaintiff cannot amend his complaint because the court would thereby be deprived of the jurisdiction because the plaintiff and third party defendants are all citizens of the State of Pennsylvania.

Ikeler v. Detroit Trust Co., 30 Fed. Supp. 643 (Dist. Ct., E. D. of Michigan, 1939), (Aff'd. 116 Fed. 807).

Morrell v. United Air Lines Transport Corp., 29 Fed. Supp. 757 (D. C., S. D. New York, 1939), 759:

"But if the scope of ancillary jurisdiction has been correctly construed, Rule 14 does not extend any jurisdiction but merely sets up the procedural machinery for the exercise of a jurisdiction which the court has always had."

As the Court pointed out in *General Taxicab Assn. v. O'Shea*, 109 Fed. Rep. (2d) 671 (*supra*), Rule 14 was adopted for the purpose of extending with some modifications, into the civil procedure of the District Courts, the practice with respect to impleading of third parties of Federal Admiralty Courts and certain State Courts, including New

York. The only procedure in New York is under Section 193 of the Civil Practice Act, which permits a defendant to implead a third party against which the defendant has a claim on the theory of primary and secondary liability. In the case at bar, since Rule 14 does not change the substantive law and since the plaintiff cannot amend his complaint because of lack of diversity of citizenship, there can be no purpose in continuing the third party defendants in the action.

It is clearly pointed out in *Johnson v. G. J. Sherrard Co. & New England Tel. & Tel. Co.* (*supra*) 2 F. R. D. 164, while there are a number of decisions holding that in ancillary proceedings jurisdictional requirements may be disregarded, as the Court pointed out in that case, the applicability of these cases depends upon whether the third party practice may be termed an ancillary proceeding incident to the main suit, or whether it may properly be regarded as a separate and independent suit. A claim over by defendant against a third party on the basis of indemnity would, of course, be an ancillary proceeding, but in the case at bar a recovery by the plaintiff against a third party defendant would not be ancillary but would involve the main suit.

The cases cited in the petition either involve (1) the substantive law of states where contribution among joint tortfeasors is allowed, or (2) involve an ancillary petition, or (3) involve primary and secondary liability.

Gray v. Hartford Accident & Indemnity Co., 31 Fed. Supp. 299.

Gray v. Hartford Accident & Indemnity Co., 32 Fed. Supp. 335.

Bossard v. McGwinn, 27 Fed. Supp. 412.

Kravas v. Great A & P Co., 28 Fed. Supp. 66.

Crim v. Appalachian Electric Power Co., 29 Fed. Supp. 90.

Williams v. Keyes, 125 Fed. (2d) 208.

Morrell v. United Air Lines Transport Corp., 29 Fed. Supp. 757 (*supra*).

Sklar v. Hayes, 1 R. F. D. 594 (*supra*).

The Pennsylvania law permits joint tort feorsors to be brought in and a third party claim, therefore, is ancillary. This case was referred to in a later decision by the District Court of Pennsylvania.

Delano v. Ives, 40 Fed. Supp. 672, 673:

"But the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff. See *Satink v. Township of Holland (Lehigh Valley R. Co.)*, D. C., N. J., February 7, 1940, 31 F. Supp. 229. In *Sklar v. Hayes (Singer v. Hayes)*, 1 F. R. D. 593, Judge Barl of this Court allowed the third party complaint, but only after sustaining the plaintiff's amendment charging direct liability against the third party defendant."

Lensch v. Bouschell Carrier Co., 1 F. R. D. 200.

It does not appear what was involved in that case, and, in any event, the question of jurisdiction does not seem to be involved.

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas, 260 U. S. 48:

This involves a question of public utility rates. This case, decided in 1922 before the promulgation of the new federal rules, had to do with the question of public utility rates and involves the bringing in of another party neces-

sary to the determination of the question. This case involves an entirely different proposition than the case at bar, where a recovery by the plaintiffs against the third party defendants would not be ancillary to the main suit but would be the main suit itself.

In the case at bar it appears that if the plaintiff so desired, the action could have been started in the State Court against the defendant Cranston as a resident of this state, and also against the third party defendants. The action could not have thus been commenced in the District Court for the Western District of New York because of lack of diversity of citizenship and the defendant should not be permitted to indirectly accomplish what could not be directly accomplished in the first place, particularly since in the death action the plaintiff as Executor would be suing himself individually.

CONCLUSION.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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